85-1141

Supreme Court, U.S.
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CASE NO.
SUPREME COURT OF THE UNITED STATES OF AMERICA
OCTOBER 1985 TERM

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

PETITIONER,

VS.

SAND KEY ASSOCIATES, LTD,

RESPONDENT.

_____/

ON WRIT OF CERTIORARI TO THE FLORIDA SECOND DISTRICT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

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SUPREME COURT OF THE UNITED
STATES OF AMERICA

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Petitioner,

vs.

SAND KEY ASSOCIATES, LTD,

Respondent.

_____/

PETITION FOR WRIT OF CERTIORARI

Question Presented for Review

The question posed by this petition is whether state law or federal common law governs the ownership of accretion to coastal waterfront property when the upland owner traces title to a federal patent. Accretion is land gradually deposited onto a shoreline. In this case the accretion is alleged to be the result of state authorized beach and shore preservation measures. Ownership of

the accretion is claimed both by the Petitioner, Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (hereinafter, Florida) and by the private upland owner, Respondent, Sand Key Associates, Ltd. (hereinafter, Sand Key).

Parties to the Proceeding Below

All parties to the proceeding before the Florida Second District Court of Appeal, from whose judgment review is sought, are listed in the caption to this petition.

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The opinion of the Florida Second District Court of Appeal from which review is sought has not been reported. The opinion may be found at the appendix to this petition at page 30. An earlier Second District decision in this litigation may be found at Sand Key Associates v. Board of Trustees of the Internal Improvement Trust Fund, 458 So.2d 369 (Fla. 2nd DCA 1984). Two decisions of the Sixth Judicial Circuit of Florida in this litigation have not been reported. They may be found at appendix, pp. 43 & 48.

Grounds for Jurisdiction of the United States Supreme Court

The opinion of the Florida Second District Court of Appeal sought to be reviewed was dated and entered October 4, 1985. The Second District Court (appendix, p. 30) relied on California ex

rel. State Lands Commission v. United States, 457 U.S. 273 (1982) and Hughes v. Washington, 389 U.S. 290 (1967), in affirming a Final Summary Judgment of the Circuit Court of the Sixth Judicial Circuit, Pinellas County, Florida. The circuit court judgment (appendix, p.43) found that Sand Key traced its title to a United States Patent issued June 20, 1883, and quieted title to the disputed accretion to Sand Key based on "decisions of the United States Supreme Court."

Jurisdiction to review the decision of the Florida Second District Court of Appeal is conferred on this Court by 28 U.S.C. §1257(3). The Florida court has affirmed a judgment declaring title to real property to belong to Sand Key and not to Florida based on federal common law. Thus, this case involves title to real property claimed and determined under

federal law.

The decision of the Second District also drawn into question the validity of a state statute, section 161.051, Florida Statutes, on the ground of its being repugnant to federal common law and the Supremacy Clause of the U.S. Constitution. Florida has asserted title to the disputed accretion pursuant to section 161.051, which provides:

> [A]ny additions or accretions to the upland caused by erection of such works or improvements [i.e. beach and shore protection measures] shall remain the property of the state . . .

Sand Key and Florida are parties to an appeal pending now before the Florida Supreme Court, which is expected to provide a definitive interpretation of section 161.051. If, as Florida contends, the statute confers to Florida title to all accretion caused by shore protection

measures, then this state statute has been implicitly invalidated on the ground of its being repugnant to federal law by the Second District decision from which review is sought in this Court.

The Florida Second District Court of Appeal is the highest court in Florida from which a decision on this issue could be had. The jurisdiction of the Florida Supreme Court is limited to the specific categories of Article V, §3(b), Florida Constitution. This case fits none of the Article V categories so the Florida Supreme Court has neither mandatory nor discretionary jurisdiction over an appeal from the Second District decision on which review is sought in this Court. See Scheb, Florida's Courts of Appeal: Intermediate Courts Become Final, 13 Stetson L. Rev. 479 (1984). The possibility of review of the Second District's

decision as "declaring invalid a state statute," Article V, §3(b)(1), Florida Constitution, is foreclosed by the Florida Supreme Court's rejection of the notion of an inherent declaration of invalidity (England and Williams, Florida Appellate Reform One Year Later, 9 Florida State L. Rev. 221(1981)) and by the Second District's prior construction of section 161.051 in this case at 458 So.2d 369, appendix, p.32.

Statement of the Case

Sand Key commenced this litigation with a quiet title action in the Circuit Court for the Sixth Judicial Circuit of Florida on or about June 23, 1983. The complaint asserted that Sand Key had acquired on December 29, 1972 title to land in Pinellas County, Florida bordering on the mean high water line of the Gulf of Mexico, and that since

obtaining title, the boundary of such land had extended seaward due to a gradual accumulation of land. As amended, the complaint contained two counts, each asserting a separate ground for Sand Key's claim to the accreted land. The first count claimed the accretion under Florida law. The second count added the allegation that Sand Key derived its title as the successor to a United States Patent issued June 20, 1883. Based on the federal patent, Sand Key asserted ownership of the accretion under federal common law. Florida admitted that the land in question was gradual accretion and admitted that Sand Key could trace its title back to an 1883 federal patent. Florida defended in the circuit court based on section 161.051, Florida Statutes, which reserved accretion caused by beach and shore protection measures to

the state.

Sand Key made two separate summary judgment motions, one based on state law, the other based on federal common law, and the two resulting circuit court orders were appealed separately. In its first summary judgment motion, Sand Key argued that an upland owner's right to accretion no matter what the accretion's cause is a vested property right under Florida law, and that therefore section 161.051 had to be narrowly construed to apply only to consenting landowners, or be struck down. On April 4, 1984, the circuit court denied the summary judgment motion, appendix, p.48. Sand Key took an interlocutory appeal, and on October 26, 1984 prevailed in the Second District Court of Appeal. (458 So.2d 369, appendix p.32.) The Second District ruled that Florida common law did create a vested

right in upland owners to accretion regardless of cause, and therefore construed section 161.051 to apply only to the particular upland owner whose land is improved by a shore protection measure. This October 26, 1984 Second District decision was the first Second District decision in this litigation, and is not the decision from which review is sought in the U.S. Supreme Court. The first Second District decision, reported at Sand Key Associates v. Board of Trustees of the Internal Improvement Trust Fund, 458 So.2d 369 (Fla. 2nd DCA 1984), appendix, p.32, certified its interpretation of section 161.051 to be a question of great public importance, thus giving the Florida Supreme Court discretionary review pursuant to Article V, §3(b)(4), Florida Constitution. An appeal is now pending before the Florida Supreme Court. The

issues briefed include (1) whether prior to the enactment of section 161.051, Florida Statutes, Florida common law created a right of water-front owners to accretion that was artificially rather than naturally caused, and (2) whether section 161.051, Florida Statutes confers title to the state of accretion to the property of a water-front owner when the accretion is caused by a shore preservation measure and the upland owner has not consented to the measure or to the state's owning the accretion.

After the appeal from the first Second District decision was filed, Sand Key went back to the circuit court with a second summary judgment motion, this time based on Sand Key's derivation of its title from an 1883 federal patent and on federal common law. Sand Key brought to the attention of the circuit court this

Court's decisions in Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10 (1935), Hughes v. Washington, 389 U.S. 290 (1967), and California ex rel. State Lands Commission v. United States, 457 U.S. 273 (1982), to demonstrate that federal common law, not state law, must be applied to determine the ownership of accretion to ocean-front property when the upland owner can trace title to a federal patent. The circuit court agreed and on December 11, 1984 issued a Final Summary Judgment (appendix, p.43), quieting title to the accretion to Sand Key. As authority, the circuit court cited "decisions of the United States Supreme Court."

Florida appealed this circuit court judgment to the Florida Second District Court of Appeal, which on October 4, 1985 issued its second decision in this litigation. In this decision, the Second

District affirmed the circuit court with no opinion, but with two citations, Hughes v. Washington and California ex rel. State Lands Commission v. United States. This second decision of the Second District Court, not appealable to the Florida Supreme Court, is the final judgment on which review is sought in the United States Supreme Court.

Argument for Allowance of Writ of Certiorari

By this petition, Florida seeks the definitive overruling of Hughes v. Washington, 389 U.S. 290 (1967). This Court should allow a writ and hear our case first because the law created by this Court needs clarification. It is uncertain whether Hughes v. Washington is still the law in light of Oregon v. Corvallis Sand and Gravel Co., 429 U.S. 363 (1977)

and California ex rel. State Lands Commission v. United States, 457 U.S. 273 (1982). Second, this case should be heard because Hughes v. Washington should be overruled. Hughes was an unwarranted intrusion by this Court into the law of real property, an area traditionally governed by state not federal law. As a matter of policy and federal-state comity this Court should disown Hughes v. Washington.

The source of the controversy over whether federal or state law should govern ownership of accretion to land once derived from the federal government is a case that did not involve accretion, Borax Consolidated, Ltd v. Los Angeles, 296 U.S. 10 (1935). In Borax, the Court ruled that the boundary of land granted by a federal patent is a federal question because:

> It is a question which concerns the validity and

> effect of an act done by the United States; it involves the ascertainment of the essential basis of a right asserted under federal law.

296 U.S. 22.

This Court first considered whether federal or state law controlled the ownership of accretion to land conveyed by the United States thirty-two years after Borax, in Hughes v. Washington. In Hughes, the successor to a federal grant of ocean-front property sued to establish her right to future accretion despite a Washington Supreme Court ruling that the Washington constitution vested accretion in the state. The U.S. Court held the choice of law to be dictated by Borax. The Court found "no significant difference" 389 U.S. 292, between the determination of the boundary of land conveyed by a federal patent in Borax

and the right to future accretion attached to land conveyed by a federal grant in Hughes. Thus, Hughes held that federal law applies to decide who owns accretion to land once conveyed by the federal government. Hughes also considered but refused to select the state rule as the federal rule, relying on Borax and on the following analysis:

> The rule deals with waters that lap both the lands of the State and the boundaries of the international sea. This relationship, at this particular point of the marginal sea, is too close to the vital interest of the Nation in its own boundaries to allow it to be governed by any law but the "supreme Law of the Land."

389 U.S. 293.

The Hughes case happened to deal with ocean-front property. In Bonelli Cattle Company v. Arizona, 414 U.S. 313 (1973), the Court addressed the choice of law question again, this time in the con-

text of accretion to land abutting the Colorado River. There, Bonelli Cattle Company owned the upland as successor to a federal patent. Arizona had obtained the land submerged under the river from the federal government by virtue of the equal footing doctrine and the Submerged Lands Act, 43 U.S.C. §§1301 et seq., upon Arizona's admission as a state. The dispute was over land formerly belonging to Bonelli Cattle that had been submerged by gradual migration of the river, and then uncovered by a rechanneling project. The Arizona Supreme Court had applied state law and ruled the land Arizona's. As in Hughes, this Court in Bonelli Cattle reversed the state court and, following Borax, determined that federal common law governed ownership of newly emerged land because the land had once been derived from the federal government.

Under Hughes and Bonelli Cattle, this Court carved out a significant part of state real property law and replaced that law with common law created by the federal courts. The displacement of state law in Hughes and Bonelli was not mandated by Congress. It did not facilitate any Congressional program. It was based on the 1935 precedent of Borax, though Borax preceded the drastic reduction of the role of federal common law in Erie Railroad v. Tompkins, 304 U.S. 64 (1938), and though Borax can easily be read to govern merely the geographic extent of a federal grant, not the perpetual legal rights of the federal grantee.

In Oregon v. Corvallis Sand and Gravel Co., 429 U.S. 363 (1977), this Court set a new course. Corvallis expressly overruled Bonelli Cattle and

reestablished the primary role of the state in the area of real property. Neither Borax nor the equal footing doctrine, the Corvallis Court ruled, was just [illegible]ion for application of federal law to determine boundary questions for land that had long been conveyed out of federal ownership. As the Court declared:

> Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. . . . This is particularly true with respect to real property, for even when federal common law was in its heyday under the teachings of Swift v. Tyson, an exception was carved out for the local law of real property.

429 U.S. 378-379 (citations omitted).

The return to state law of accretion questions on river-front property logically should apply to ocean-front property as well. The Corvallis

Court declined to rule on the status of Hughes however, and suggested in a footnote that application of federal common law might be justified for ocean-front property by the language in Hughes, quoted above, concerning waters that lap the international sea. This contention was addressed by Justice Marshall, dissenting in Corvallis, at 429 U.S. 383, ftn. 1. Justice Marshall correctly points out that land above the mean high tide does not touch the international sea. It is submerged land below the mean high tide that extends to international water, and this land is clearly owned by the state. Accretion, such as that involved in Hughes, California ex rel. State Lands Commission v. United States, and the instant case, all lies above mean high tide. As Justice Marshall stated, "There are no international relations implica-

Court rejected the notion that Hughes had been undermined by Corvallis. The "international sea" language of Corvallis, which had been criticized by Justice Marshall, was used to distinguish ocean-front property. The Court stated in California that ownership of accretion to ocean-front property derived from the federal government would be decided by federal law.

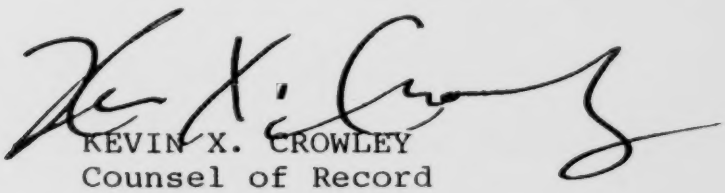
This Court should not feel bound by the parts of the California opinion that go beyond the ruling of the case. In the typical accretion situation, when the United States is not a party, there is no real federal interest. The prettiness of the Hughes phrasing about "waters that lap both the lands of the State and the boundaries of the international sea" should not distract the Court from the passage's inaccuracy and immateriality to any policy

that might justify application of federal law. There is no good reason for grantees of federal river-front land to be subject to state law while grantees of federal ocean-front land and their successors forever are subject to federal common law.

In sum, the choice of law is unclear for determining ownership of accretion to ocean-front property when the upland owner is the successor to someone who got title from the United States government. Corvallis seemed to leave the question to local real property law, but dicta in California has revived the application of federal common law. Florida respectfully requests that this Court allow a writ of certiorari and clarify the law by expressly overruling Hughes v. Washington and by determining that neither a remote federal grant, nor location of property on the coast, nor both, will

justify use of federal law to determine the ownership of accretion.

Respectfully submitted.



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APPENDIX

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IN THE DISTRICT COURT OF
APPEAL OF FLORIDA
SECOND DISTRICT

CASE NO. 85-26

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Appellant,

vs.

SAND KEY ASSOCIATES, LTD,

Appellee.

_____/

Opinion filed October 4, 1985.

Appeal from the Circuit Court for Pinellas County; John S. Andrews, Judge.

Steven A. Been, Assistant General Counsel, Department of Natural Resources, Tallahassee, for Appellant.

Richard J. Salem and David J. Tong of Richard J. Salem, P.A., Tampa, and William J. Kimpton of Dunbar, Kimpton, Burke, Boyer, Roman and Schafer, Clearwater, for Appellee.

PER CURIAM

Affirmed. See California ex

rel. State Lands Commission v. United States, 457 U.S. 273, 102 S.Ct. 2432, 73 L.Ed.2d 1 (1982), and Hughes v. Washington, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967).

DANAHY, A.C.J., and LEHAN and HALL, JJ., Concur.

IN THE DISTRICT COURT OF
APPEAL OF FLORIDA
SECOND DISTRICT

CASE NO. 84-960

SAND KEY ASSOCIATES, LTD,

Appellant,

vs.

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Appellee.

_____/

Opinion filed October 26, 1984.

Appeal from nonfinal order of the Circuit Court for Pinellas County; John S. Andrews, Judge.

Richard J. Salem, Tampa, and William J. Kimpton of Case, Kimpton & Burke, P.A., Clearwater, for Appellant.

John W. Williams, Assistant General Counsel, Department of Natural Resources, Tallahassee, for Appellee.

RYDER, Chief Judge.

We are concerned here with determining the owner of accreted land and the constitutionality of section 161.051, Florida Statutes (1981). In 1974, the state of Florida constructed a jetty on oceanfront property on Sand Key in Pinellas County, Florida. Sand Key Associates, Limited (Sand Key) also owns oceanfront property approximately one-half mile south of the jetty. After the construction of the jetty, there was a gradual build-up of land because of accretion on Sand Key's property. The accreted land now exceeds five acres. The parties agree that the accretion is due to the erection of the jetty and that Sand Key neither participated in nor contributed to the jetty project. The jetty was not constructed on Sand Key's property.

Both parties claim ownership of the accreted land. The state bases its

claim on section 161.051, Florida Statutes (1981), which provides as follows:

> Coastal construction by persons, firms, corporations or local authorities.--Where any person, firm, corporation, county, municipality, township, special district, or any public agency shall construct and install projects when permits have been properly issued, such works and improvements shall be the property of said person, firm, corporation, county, municipality, township, special district, or any public agency where located, and shall thereafter be maintained by and at the expense of said person, firm, corporation, county, municipality, township, special district, or other public agency. No grant under this section shall affect title of the state to any lands below the mean high-water mark, and any additions or accretions to the upland caused by erection of such works or improvement shall remain

> the property of the state if not previously conveyed. The state shall in no way be liable for any damages as a result of erections of such works and improvements, or for any damages arising out of construction, reconstruction, maintenance, or repair thereof, or otherwise arising on account of such works or improvements.

Sand Key bases its claim on the common law rule as applied in Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So.2d 209 (Fla. 2d DCA 1973), that the upland riparian or littoral[1] owner has a vested right to all accretion, whether naturally or artifically caused.

The trial court entered a partial summary judgment for the state, quieted title to the accreted land in the state, enjoined Sand Key from possessing the disputed property, and declared

section 161.051 to be constitutional. The trial court ruled that pursuant to section 161.051 the state holds title to all accretion to the upland owned by any person when the accretion results from works or projects described in the statute. We reverse.

At common law littoral or riparian rights included the right of ingress and egress from the water to the land and the right in the land growing out of accretion or reliction. Such property rights are vested and cannot be taken away without just compensation. Thiesen v. Gulf, F. & A. Ry. Co., 75 Fla. 28, 78 So. 491 (1917).

This court in Medeira Beach Nominee, Inc. applied the common law rule and held that a strip of accreted land became the property of the upland littoral owner even where the accretion was the

result of a lawful exercise of police power by a municipality to prevent beach erosion. We expressly did not consider section 161.051 in that case because the erosion project at issue began in 1957 while the statute was not enacted until 1965.

Section 161.051 states that any accretions to the upland caused by a work or improvement pursuant to that section shall remain the property of the state. It is unclear whether the legislature intended for section 161.051 to apply only to the upland owner of the improved property or also to the upland littoral owners whose property becomes accreted because of the improvement.

To the extent that section 161.051 applies to other upland littoral owners who neither participated in nor contributed to the improvement, the

statute is in derogation of the common law and must be strictly construed. The presumption is that no change in the common law is intended unless the statute explicitly so states. Inference and implication cannot be substituted for clear expression. Carlile v. Game & Fresh Water Fish Commision, 354 So.2d 362 (Fla. 1977).

Section 161.051 does not explicitly state that it applies to all upland littoral owners. Therefore, construing the statute strictly, we hold that it applies only to the upland owner of the improved property. Section 161.051 does not affect Sand Key's vested right to accretion on its property.

We approve the trial court's ruling that section 161.051 is constitutional but reverse the remainder of the order. The lower court's order effectively divested Sand Key of its littoral

rights without compensation. We hold that the disputed five acres of accreted property, all future accretions on the property and all property rights incident thereof belong to Sand Key. The injunction prohibiting Sand Key from possessing its property is dissolved.

Recognizing that the intent of section 161.051 is unclear, we certify the following question to the Florida Supreme Court as one of great public importance:

> PURSUANT TO SECTION 161.051, FLORIDA STATUTES (1981), IS THE STATE ENTITLED TO ACCRETED LAND OF ONLY THE UPLAND OWNER OF THE IMPROVED PROPERTY OR TO THE ACCRETED LAND OF ALL UPLAND LITTORAL OWNERS, WHETHER OR NOT THEY PARTICIPATED IN OR CONTRIBUTED TO THE IMPROVEMENT?

REVERSED.

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1. While the rights incident to ownership of land abutting a sea, lake, or pond are commonly referred to as riparian rights, they are technically littoral rights. Riparian rights are those incident to

ownership of land contiguous to and abutting flowing, navigable waters such as streams or rivers. Gillilan v. Knighton, 420 So.2d 924 (Fla. 2d DCA 1982).

CAMPBELL, J., Concurring With Opinion In Result Only.

While I concur with the result reached by the majority, I interpret section 161.051 somewhat differently. The statute must be considered in its entirety to apprehend what I perceive to have been the intent of the legislature. The first sentence of section 161.051 operates to vest title to any works or improvements provided for therein in the entity which was permitted to construct such works or improvements. I conclude that the second sentence was enacted only to ensure that the state retains ownership of lands below the mean high-water mark and, where the state owns upland of the mean high-water mark, any additions or accretions to the state-owned upland.

In other words, the grant of title to the works or improvements to the entity constructing that work or improvement does not carry with it any additions or accretions. Therefore, where the state owned the upland and the land below the mean high-water mark, the title to the upland, the land below the mean high-water mark, and any additions or accretions shall, in the words of the statute, "remain the property of the state if not previously conveyed." The grant of title to the constructing entity carries no more than title to the improvement itself. Apparently, this grant is provided so that there will be no dispute over the requirement of the statute that the constructing entity shall, at its expense, maintain the works or improvements. Where the upland owner is not the state, nor the entity constructing the work or improvement, the

additions or accretions become the property of the upland owner. Therefore, what may have been state owned lands below the mean high-water mark as a result of the additions or accretions, become the property of the upland owner. The state would continue to own the land that is below the mean high-water mark after the additions of accretions. The result of the additions or accretions is to establish a new mean high-water mark.

LEHAN, J., concurs.
CAMPBELL, J., concurring with opinion in result only.

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PINELLAS COUNTY, FLORIDA

CIVIL DIVISION
CASE NO. 83-6614-14

SAND KEY ASSOCIATES, LIMITED,

Plaintiff,

vs.

THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Defendant.
_____/

FINAL SUMMARY JUDGMENT

THIS CAUSE came on to be heard before the Court upon the Plaintiff's Motion for Summary Judgment as to Count II, and this Court having reviewed the Memoranda of Law submitted by both parties through their respective counsel, pursuant to prior Order of Court, and the Court having carefully considered the record in this cause and being otherwise fully apprised in the premises, finds as

follows:

1. That the undisputed material facts are as follows:

A. Plaintiff is the owner of the upland described in Exhibit "A" to the Complaint;

B. That neither Plaintiff nor anyone acting on its behalf has, in any way, caused or contributed to the accretion that has and continues to occur to Plaintiff's land, as described in Exhibit "C" to the Complaint.

C. That the gradual and imperceptable accumulation of soil to Plaintiff's upland was a result of accretion;

D. That the Plaintiff derives its title to the real property described in Exhibit "A" to the Complaint herein from a United States Patent issued on June 20, 1883;

E. That the Plaintiff is a successor in interest to that certain real property more particularly described as:

Lots No. 1 and 2 of
Section 17 in Township
29 South of Range 15
East of Tallahassee
Meridian in Florida.

2. That based upon decisions of the United States Supreme Court, the Plaintiff is entitled to Judgment quieting title to the real property described in Exhibit "C" to the Complaint, as a matter of law, and it is thereupon,

ORDERED AND ADJUDGED as follows:

1. That Plaintiff's Motion for Summary Judgment as to Count II, be and the same is hereby granted.

2. That based upon the foregoing ruling, the Plaintiff is declared to be the fee simple owner of the following described real property:

Beginning at the Northwest corner of Section 20, Township 29 South, Range 15 East, said point having the coordinates (based on the Pinellas County Grid System) of North 16500.72, East 31452.98; thence North 89° 10'31" East, 843.47 feet to a point on the center line of Gulf Boulevard; thence along said center line North 42°13'31" East,386.07 feet; thence North 47°46'29" West, 843 feet more or less to the mean high water line (elevation 1.2 feet sea level datum), and the point of beginning; thence continue along said line North 47° 46'29" West, 377 feet more or less to the mean high water line (elevation 1.2 feet sea level datum) as of December 15, 1982, thence northerly along said line to a point on a line 500 feet North of and parallel to the Southerly boundary line; thence South 47°46'29" East, 501 feet more or less to the afore-described mean high water line; thence Southerly along said line to the point of beginning, containing 5.08 acres, more or less.

together with all future accretions on the property, and all property rights thereof.

3. That by this Judgment, fee simple title to the above described real property should be, and is hereby quieted against the Defendant, THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA, now and for all time, in favor of the Plaintiff, SAND KEY ASSOCIATES, LTD.

4. That the Court reserves jurisdiction to award attorneys fees and court costs at a later time.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida, this 11th day of December 1984.

JOHN S. ANDREWS
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE SIXTH JUDICIAL CIRCUIT, IN AND FOR PINELLAS COUNTY, FLORIDA

CIVIL DIVISION
CASE NO. 83-6614-14

SAND KEY ASSOCIATES, LIMITED,

Plaintiff,

vs.

THE BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Defendant.
_____/

FINAL PARTIAL SUMMARY JUDGMENT

THIS CAUSE came on to be heard before the Court upon Plaintiff's Motion for Summary Judgment as to Count I, and Defendant's instanter request for Declaratory Judgment with respect to the validity of Section 161.051, Florida Statutes, which this Court construes as a Motion for Final Partial Summary Judgment; both parties having been represented before the Court by their respective coun-

sel on February 15, 1984; the Court having carefully considered the record in this cause and being otherwise fully apprised in the premises, finds as follows:

1. That this Court has jurisdiction over the parties and subject matter hereto;

2. That Defendant's instanter Motion requesting Partial Summary Judgment with respect to the validity of Section 161.051, Florida Statutes, was proper for consideration by the Court, inasmuch as Plaintiff waived any objection thereto;

3. That a determination of the validity of Section 161.051, Florida Statutes, is vital to the disposition of this cause, and the question of its constitutionality is one of great public interest;

4. That both parties seek this Court's review of Florida Statute 161.051, and the Court finds that neither party

will be caused prejudice, and that the ends of justice will best be served by the Court, and the Appellate Courts of this State, determining the validity of said statute, the constitutionality of which has not heretofore been passed upon by the Courts of this State;

5. That the undisputed material facts are as follows:

A. Plaintiff is the owner of the upland described in Exhibit "A" to the Complaint.

B. That neither the Plaintiff nor anyone acting on its behalf has, in any way, caused or contributed to accretion that has and continues to occur to Plaintiff's land, as described in Exhibit "C" to

the Complaint.

C. That the gradual and imperceptible accumulation of soil to Plaintiff's upland was the result of accretion.

6. That Count II of the Complaint, as amended, constitutes a distinct and separate cause of action which is not interdependent with Count I and, moreover, the claim set forth in Count II is not yet at issue before the Court;

7. That the Plaintiff will be entitled to immediate possession of so much of the real property, as described in Exhibit "C", as may be determined to be the result of a public works' project, if its Motion for Summary Judgment as to Count I is granted, and correspondingly, Plaintiff will be enjoined from taking

possession of real property if said Motion is denied;

8. That the parties agree and the Court confirms that the only disputed issue of fact is the cause and extent of accretion that occurred and continues to occur to Plaintiff's land. This fact is not material to the Court's determination of statutory validity as requested by the parties, and it is thereupon,

ORDERED AND ADJUDGED as follows:

1. That Plaintiff's Motion for Summary Judgment as to Count I, be and the same is hereby denied. Defendant's Motion for Summary Judgment, requesting the Court to adjudge Florida Statute 161.051 to be valid, be and the same is hereby granted. The Court finally and expressly declares that Section 161.051, Florida Statutes, is constitutional and that the State of

Florida validly holds title to all accretion to the upland, whether proximate or remote, of any person which results from works and/or projects specifically described in the said statute, and not only to accretion to the upland of a person who has constructed or installed such a work or project.

2. That based upon the foregoing ruling, the Plaintiff is denied immediate possession to the real property described in Exhibit "C" to the Complaint and is, furthermore, enjoined from taking immediate possession of said property until further Order of this Court.

DONE AND ORDERED in Chambers at Clearwater, Pinellas County, Florida, this 4th day of April, 1984.

JOHN S. ANDREWS
CIRCUIT JUDGE

AFFIDAVIT OF SERVICE

Steven A. Been, being duly sworn, deposes and says:

On January 2, 1986, I deposited three copies of the foregoing Petition for Writ of Certiorari in a United States post office in Tallahassee, Florida, with first-class postage prepaid, addressed to Richard J. Salem, Esquire, Counsel of Record for Sand Key Associates, Ltd, at his post office address, 111 Parker Street, Suite 301, Post Office Box 3399, Tampa, Florida 33601.

Steven A. Been
STEVEN A. BEEN

Sworn before me
this 2nd day of
January, 1986.

Sylvana Huntley
Notary Public
My Commission Expires: 12-9-89

Supreme Court, U.S.
FILED
MAR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

CASE NO. 85-1141
SUPREME COURT OF THE UNITED
STATES OF AMERICA
OCTOBER 1985 TERM

BOARD OF TRUSTEES OF THE INTERNAL
IMPROVEMENT TRUST FUND OF THE STATE
OF FLORIDA,

PETITIONER,

VS.

SAND KEY ASSOCIATES, LTD.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE
FLORIDA SECOND DISTRICT COURT
OF APPEAL

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RICHARD J. SALEM, ESQ.
Counsel of Record
RICHARD J. SALEM, P.A.
111 Parker St., Ste. 301
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Tampa, Florida 33601
(813) 254-9000

22 pp

SUPREME COURT OF THE UNITED STATES OF AMERICA

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Petitioner,

vs.

SAND KEY ASSOCIATES, LTD.,

Respondent.

_____/

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Parties to the Proceeding Below

All parties to the proceeding before the Florida Second District Court of Appeal, from whose judgment review is sought, are listed in the caption to this Brief.

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References to Reports of Opinions Below

Sand Key Associates, Ltd. accepts the References to Reports of Opinions Below filed by the State, but would go further and point out that on October 29, 1985, the Florida Second District Court of Appeal, on rehearing, withdrew its October 4, 1985 opinion and substituted its January 29, 1986 opinion. The opinion may be found at the Appendix to this Petition, at page 13.

SUMMARY OF THE ARGUMENT

This Court lacks jurisdiction to entertain the Petition for Writ of Certiorari filed by the State. The October 4, 1985 opinion from which review was sought has been withdrawn, and a new opinion substituted therefor on rehearing. Review of the January 29, 1986 opinion is available in the Florida Supreme Court, and therefor there is no final judgment "rendered by the highest court of a State in which a decision could be had ...", as required by 28 U.S.C. §1257. The Petition for Writ of Certiorari was filed prematurely by the State, and this Court should deny that Petition.

ARGUMENT

This Court lacks jurisdiction to entertain the Petition for Writ of Certiorari filed by the Board of Trustees of the Internal Improvement Trust Fund of the State of Florida (hereinafter the "State"), because the decision of the Florida Second District Court of Appeal entered on October 4, 1985 is not a judgment "by the highest court of a State in which a decision could be had ...", as required by 28 U.S.C. §1257. The State timely moved for a "Rehearing En Banc" of that decision. On January 29, 1986, the Florida Second District Court of Appeal, treating the Motion for Rehearing En Banc as a Motion for Rehearing, withdrew the October 4, 1985 decision, and substituted a new opinion therefor. (Appendix, p. 11). The January 29, 1986 opinion (Appendix, p. 13)

also affirmed the trial court's judgment, but significantly, certified a question to the Florida Supreme Court as one of great public importance.

Based on the certified question in the January 29, 1986 decision, the Florida Supreme Court has discretionary jurisdiction to hear a Petition for Review of the Florida Second District Court's decision. Art. V, §3(b)(4), Florida Constitution. On February 27, 1986, the State filed a Notice to Invoke the Discretionary Jurisdiction of the Florida Supreme Court (Appendix, p. 19). Although the Florida Supreme Court would not have had jurisdiction to review the October 4, 1985 decision, see Jenkins v. State, 385 So.2d 1356 (Fla. 1980), it may review the January 29, 1986 decision of the Florida Second District Court of Appeal.

The Petition for Writ of Certiorari was filed during the pendency of a Motion for Rehearing, and therefor has no effect. Cf. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982), holding that a notice of appeal filed prior to the disposition of a motion for rehearing has no effect. Accordingly, because review in the Florida Supreme Court is available to the State, the decisions of the Florida Second District Court of Appeal are not judgments "rendered by the highest court of a state in which a decision could be had ...", this Court lacks jurisdiction over the Petition for Writ of Certiorari. 28 U.S.C. §1257. The Petition for Writ of Certiorari was premature, because the October 4, 1985 Judgment was not "final". See Communist Party v. Whitcomb, 414 U.S. 441 (1974).

CONCLUSION

This Court should deny the Petition for Writ of Certiorari because the Petition was premature, and there is not a judgment "rendered by the highest court of a State in which a decision could be had ...", to review by Petition for Writ of Certiorari.

Respectfully submitted,

RICHARD J. SALEM, ESQ.
Counsel of Record
RICHARD J. SALEM, P.A.
111 Parker St., Ste. 301
P.O. Box 3399
Tampa, Florida 33601
(813) 254-9000

BY:_____
Richard J. Salem, Esq.

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IN THE SECOND DISTRICT
COURT OF APPEAL
LAKELAND, FLORIDA

JANUARY 29, 1986

CASE NO. 85-26

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Appellant,

vs.

SAND KEY ASSOCIATES, LIMITED,

Appellee.

Upon consideration of appellant's motion for rehearing en banc, treated as a motion for rehearing, the motion is granted to the extent that the original opinion issued herein on October 4, 1985, is hereby withdrawn and the attached opinion is substituted therefor; otherwise the motion is denied.

The motion to strike filed by appellee is denied.

A TRUE COPY

ATTEST:

WILLIAM A. HADDAD

CLERK, DISTRICT COURT OF APPEAL

SECOND DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA SECOND DISTRICT

CASE NO. 85-26

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Appellant,

vs.

SAND KEY ASSOCIATES, LIMITED,

Appellee.

Opinion filed January 29, 1986.

Appeal from the Circuit Court for Pinellas County; John S. Andrews, Judge.

Steve A. Been, Assistant General Counsel, Department of Natural Resources, Tallahassee, for Appellant.

Richard J. Salem and David J. Tong of Richard J. Salem, P.A., Tampa, and William J. Kimpton of Dunbar, Kimpton, Burke, Boyer, Roman and Schafer, Clearwater, for Appellee.

DANAHY, Acting Chief Judge.

This is the second appearance here of a dispute between the parties over the ownership of certain accreted lands abutting the gulf-front upland property of Sand Key Associates, Limited (Sand Key). When the case was first here, we reversed the partial summary judgment entered on Count I in favor of the appellee (State). Sand Key Associates, Ltd. v. Board of Trustees of the Internal Improvement Trust Fund, 458 So.2d 369 (Fla. 2d DCA 1984) (Sand Key I). The effect of our reversal was to quiet title to the accreted land in Sand Key. In doing so, we held that Florida Statute 161.051 1/ was constitutional but did not apply here since the public project which caused the accretion was not done on Sand Key's

property. However, recognizing that the legislative intent of section 161.051 was not clear, we certified the following question to our supreme court as one of great public importance:

> PURSUANT TO SECTION 161.051, FLORIDA STATUTES (1981), IS THE STATE ENTITLED TO ACCRETED LAND OF ONLY THE UPLAND OWNER OF THE IMPROVED PROPERTY OR TO THE ACCRETED LAND OF ALL UPLAND LITTORAL OWNERS, WHETHER OR NOT THEY PARTICIPATED IN OR CONTRIBUTED TO THE IMPROVEMENT?

The supreme court has accepted jurisdiction. (Board of Trustees of the Internal Improvement Trust Fund v. Sand Key Associates, Ltd., No. 66,372.)

Subsequent to our disposition of Sand Key I, the trial court entered a final summary judgment on Count II of Sand Key's amended complaint. That judgment is before us for review (Sand Key II). In Sand Key I, the judgment under review contained a

finding that Count II was a distinct and separate cause of action. Count II requires an answer to the question whether federal or state law determines the title to accreted lands where the littoral upland owner, as Sand Key is here, derives its title from a federal patent. The trial court, answering that question, ruled that federal law controls and that, consequently, Sand Key owned the accreted land. The result reached by the trial court in Sand Key II is consistent with the result reched by this court in Sand Key I.

We think the trial court reached the proper conclusion and we therefore affirm the judgment. Where title to oceanfront property is derived from a federal patent, federal law determines the extent of that title including title to all future accretions and all such accretions belong to the littoral landowner. See California

ex rel. State Lands Commission v. United States, 457 U.S. 273, 102 S.Ct. 2432, 73 L.Ed.2d 1 (1982), and Hughes v. Washington, 389 U.S. 290, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967). The common law of this state is in agreement. Board of Trustees of the Internal Improvement Trust Fund v. Medeira Beach Nominee, Inc., 272 So.2d 209 (Fla. 2d DCA 1973).

While we do affirm the ruling of the trial court, we think our supreme court should have the advantage of the parties' arguments in this case to fully explore the important question already before the court in Sand Key I if it so chooses. Therefore, we certify the following further question to the supreme court as one of great public importance:

> DOES THE ANSWER TO THE QUESTION POSED IN SAND KEY ASSOCIATES, LTD. v. BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND, 458 So.2d 369

(Fla. 2d DCA 1984), DEPEND UPON WHETHER THE TITLE OF ANY UPLAND OWNER IS TRACEABLE TO A FEDERAL PATENT?

LEHAN and HALL, JJ., Concur.

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1. Section 161.051 provides:

> Coastal construction by persons, firms, corporations, or local authorities.-Where any person, firm, corporation, county, municipality, township, special district, or any public agency shall construct and install projects when permits have been properly issued, such works and improvements shall be the property of said person, firm, corporation, county, municipality, township, special district, or any public agency where located, and shall thereafter be maintained by and at the expense of said person, firm, corporation, county, municipality, township, special district, or other public agency. No grant under this section shall affect title of the state to any lands below the mean high-water mark, and any additions or accretions to the upland caused by the erection of such works or improvements, or for any damages arising out of construction, reconstruction, maintenance, or repair thereof, or otherwise arising on account of such works or improvements.

IN THE DISTRICT COURT
OF APPEAL OF THE SECOND
DISTRICT OF FLORIDA.

CASE NO. 85-26

BOARD OF TRUSTEES OF THE INTERNAL IMPROVEMENT TRUST FUND OF THE STATE OF FLORIDA,

Defendant, Petitioner

vs.

SAND KEY ASSOCIATES, LIMITED,

Plaintiff, Respondent

_____/

NOTICE TO INVOKE DISCRETIONARY JURISDICTION

NOTICE IS GIVEN that the Board of Trustee of the Internal Improvement Trust Fund of the State of Florida, Defendant, Petitioner, invokes the discretionary jurisdiction of the Supreme Court to review the decision of this Court rendered January 29, 1986. The decision passes on a

question certified to be of great public importance.

STEVEN A BEEN
Counsel for Petitioner
Suite 1003 Douglas Bldg.
3900 Commonwealth Blvd.
Tallahassee, FL 32303
(904) 488-9223

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct of the foregoing Notice has been furnished by U.S. Mail to RICHARD SALEM, Esquire, Post Office Box 339, Tampa, Florida 33601 this 26th day of February, 1986.

STEVEN A BEEN

AFFIDAVIT OF SERVICE

RICHARD J. SALEM, being duly sworn, deposes and says:

On March 7, 1986, I deposited three (3) copies of the foregoing Brief in Opposition to the Petition for Writ of Certiorari in a United States Post Office in Tampa, Florida with first class postage prepaid, addressed to Kevin X. Crowley, Counsel of Record, General Counsel, Florida Department of Natural Resources, 3900 Commonwealth Boulevard, Tallahassee, Florida 32303.

_____
Richard J. Salem

SWORN TO and subscribed before me this 7th day of March, 1986.

_____
NOTARY PUBLIC

MY COMMISSION EXPIRES: